

---

**No. SC85731**

---

**IN THE MISSOURI SUPREME COURT**

---

**STATE OF MISSOURI, EX REL  
SAMUEL STEELEY,**

**Relator,**

**vs.**

**THE HONORABLE KENNETH OSWALD,  
JUDGE OF THE CIRCUIT COURT OF  
MILLER COUNTY, MISSOURI, ASSOCIATE DIVISION,**

**Respondent.**

---

**PETITION FOR WRIT OF PROHIBITION  
ASSOCIATE CIRCUIT COURT OF MILLER COUNTY, MISSOURI  
THE HONORABLE KENNETH OSWALD, JUDGE**

---

**RELATOR'S BRIEF**

---

**Erik A. Bergmanis, Mo. Bar #33151  
Matthew C. Price, Mo. Bar #51520  
Bergmanis & McDuffey, L.L.C.  
Attorneys at Law  
237 W. Hwy. 54, Ste. 201  
P.O. Box 229  
Camdenton, Missouri 65020  
Phone: (573) 346-2111  
Fax: (573) 346-5885**

**Attorneys for Relator Samuel Steeley**

---



## **TABLE OF CONTENTS**

TABLE OF AUTHORITIES .....	2
JURISDICTIONAL STATEMENT .....	5
STATEMENT OF FACTS.....	6
POINTS RELIED ON.....	8
STANDARD OF REVIEW .....	13
ARGUMENT.....	16
CONCLUSION .....	33
CERTIFICATE OF SERVICE AND OF COMPLIANCE.....	35
RELATOR’S APPENDIX .....	36
RELATOR’S APPENDIX INDEX .....	37

## **TABLE OF AUTHORITIES**

### **CASES:**

<b><u>Coleman v. Alabama</u></b> , 399 U.S. 1, 10 (1970) .....	8, 17, 18, 20, 21, 33
<b><u>Gannett v. DePasquale</u></b> , 443 U.S. 368, 380 (1979).....	8, 21
<b><u>State v. Brinkley</u></b> , 189 S.W.2d 314, 354 Mo. 337 (1945) .....	17
<b><u>State v. Eaton</u></b> , 504 S.W.2d 12 (Mo. 1973).....	20, 32
<b><u>State v. Ferguson</u></b> , 212 S.W. 339, 278 Mo. 119 (Mo. banc 1919).....	32
<b><u>State v. Hughey</u></b> , 404 S.W.2d 725, 729 (Mo. 1966).....	12, 31, 32
<b><u>State v. Maxwell</u></b> , 400 S.W.2d 156, 159 (Mo. 1966) .....	19, 20, 32
<b><u>State v. McKinley</u></b> , 341 Mo. 1186 , 111 S.W.2d 115, 117 (Mo. 1937).....	17
<b><u>State v. Quinn</u></b> , 405 S.W.2d 895, 899 (Mo. 1966) .....	20, 32
<b><u>State ex rel. and to Use of Conran v. Duncan</u></b> , 63 S.W.2d 135, 138 (Mo. 1933) .....	5
<b><u>State ex rel. Chassaing v. Mummert</u></b> , 887 S.W.2d 573, 577 (Mo. banc 1994).....	14
<b><u>State ex rel. Cohen v. Riley</u></b> , 994 S.W.2d 546, 549 (Mo. banc 1999).....	14
<b><u>State ex rel. Director of Revenue, State of Mo. v. Gaertner</u></b> , 32 S.W.3d 564, 566 (Mo. banc 2000) .....	13
<b><u>State ex rel. Linthicum v. Calvin</u></b> , 57 S.W.3d 855, 857 (Mo. banc 2001).....	13
<b><u>State ex rel. Nixon v. Kinder</u></b> , 2003 WL 21788869, 2 (Mo. App. W.D. 2003) .....	13
<b><u>State ex rel. Thomas v. Crouch</u></b> , 603 S.W.2d 532, 545 (Mo. banc 1980) .....	8, 17

<b><u>State ex rel. York v. Daugherty</u></b> , 969 S.W.2d 223, 224 (Mo. banc 1998).....	13
<b><u>State of Missouri ex rel. Joy Lynn Hardey v.</u></b>	
<b><u>The Honorable Greg Kays</u></b> , (Mo. App. 1996).....	10, 24
<b><u>State of Missouri ex rel. Ralph Swindle v.</u></b>	
<b><u>The Honorable Greg Kays</u></b> , (Mo. App. 1995).....	10, 23
<b><u>Thomas v. Mead</u></b> , 36 Mo. 232 (1865).....	5
<b><u>U.S. v. Cianfrani</u></b> , 573 F.2d 835, 852-853 (3d Cir. 1978).....	21
<b><u>U.S. ex rel. Bennett v. Rundle</u></b> , 419 F.2d 599, 606 (3d Cir. 1969).....	8, 21

#### **OTHER AUTHORITIES:**

Article V, Section 4, Missouri Const. 1945 .....	5, 19
J. Wyrsh, S. Hunt, and A. Nugent, <b><u>Missouri Criminal Trial Practice</u></b>	
at 163 (1994).....	17
Missouri Supreme Court Rule 14.....	11, 23, 27
Missouri Supreme Court Rule 22.09 .....	9, 17
Missouri Supreme Court Rule 22.10 .....	9, 19, 20
Section 544.250, RSMo 2002 .....	9, 17
Section 544.370, RSMo 2002 .....	9, 12, 19, 20, 30, 31, 32
Section 544.390, RSMo 2002 .....	12, 30, 31, 32
Section 566.034, RSMo 1999 .....	6
Section 566.064, RSMo 1999 .....	6

Section 568.020, RSMo 1999 .....	6
U.S. Const. Amend. VI .....	8, 13, 16, 20, 21, 22
<b><u>The Right to Attend Criminal Hearings</u></b> , 78 Colum. L. Rev. 1308 (1978) .....	33
Twenty-Sixth Judicial Circuit	
Local Rule 11(3) .....	9, 10, 11, 19, 23, 24, 26, 27, 28, 29

## **JURISDICTIONAL STATEMENT**

The Missouri Supreme Court is an appropriate original jurisdiction to petition for an extraordinary writ pursuant to the authority granted under Article V, Section 4 of the Missouri Constitution of 1945. Specifically, the writ of prohibition was first recognized as an extraordinary writ in Missouri with original jurisdiction in the Missouri Supreme Court in **Thomas v. Mead**, 36 Mo. 232 (1865).

In this case, Relator's Petition for Writ of Prohibition was properly filed with this Court on December 18, 2003. This Court preliminarily sustained Relator's Petition and issued a Preliminary Order on December 19, 2003.

Where Constitutional questions of law emerge, this Court has found that Constitutional issues can be appropriately answered in an original prohibition action if there is an inadequate or non-existent remedy through appeal. **State ex rel. and to Use of Conran v. Duncan**, 63 S.W.2d 135, 138 (Mo. 1933).

Clearly, Relator will have no manner in which to go back and obtain a transcript later, nor will the Relator have any record of the preliminary hearing to point to in showing that the trial court committed reversible error once the preliminary hearing is complete. Thus, this case is properly under the original jurisdiction and control of this Court.

## **STATEMENT OF FACTS**

On June 18, 2003, Relator Samuel Steeley (“Relator”) was charged with the felony offenses of statutory rape in the second degree in violation of Section 566.034 RSMo, statutory sodomy in the second degree in violation of Section 566.064 RSMo, and incest in violation of Section 568.020 RSMo. The case is currently pending in the Associate Circuit Court of Miller County, Missouri, titled State of Missouri vs. Samuel Steeley, Case Number CR603-1048F, and was scheduled for preliminary hearing on Monday, December 22, 2003 at 3:30 p.m.

Relator, by and through his attorney, Erik Bergmanis, made an oral motion on November 10, 2003 to allow a stenographic recording or verbatim record of the preliminary hearing set for the same date. In said oral motion, Relator agreed to retain a certified court reporter to transcribe the proceedings at the preliminary hearing, at Relator’s expense, and agreed to provide a copy to the Prosecutor, free of charge. Relator’s certified court reporter was present in the courtroom at that time, ready to proceed to make a recording of the preliminary hearing.

Respondent denied said Motion on November 10, 2003 and reset the preliminary hearing on December 22, 2003. A certified copy of Respondent’s order is attached hereto.

Relator filed his Petition for a Writ of Prohibition and Suggestions in Support thereof on December 18, 2003 to determine Relator’s rights in retaining a certified



court reporter to record the preliminary hearing of his felony criminal charges, at Relator's expense. This Court issued a Preliminary Writ staying any further preliminary hearing proceedings and ordered that Respondent file a response by January 19, 2004. Respondent forwarded an answer to Relator's Petition on January 20, 2004.

## **POINTS RELIED ON**

### **I.**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR’S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES AND APPLIES THE LAW BY VIOLATING THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT A PRELIMINARY HEARING IS A “CRITICAL STAGE” OF CRIMINAL COURT PROCEEDINGS UNDER THE SIXTH AMENDMENT ENTITLING RELATOR TO CERTAIN FUNDAMENTAL RIGHTS INCLUDING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, THE RIGHT TO EFFECTIVE CONFRONTATION OF WITNESSES, AND THE RIGHT TO A FAIR AND PUBLIC TRIAL, ALL OF WHICH SHOULD PERMIT RELATOR TO RECORD HIS PRELIMINARY HEARING.**

---

**Coleman v. Alabama**, 399 U.S. 1, 10 (1970)

**State ex rel. Thomas v. Crouch**, 603 S.W.2d 532, 545 (Mo. banc 1980)

**U.S. ex rel. Bennett v. Rundle**, 419 F.2d 599, 606 (3d Cir. 1969)

**Gannett v. DePasquale**, 443 U.S. 368, 380 (1979)

U.S. Const. Amend. VI

Section 544.250, RSMo 2002

Section 544.370, RSMo 2002

Missouri Supreme Court Rule 22.09

Missouri Supreme Court Rule 22.10

Twenty-Sixth Judicial Circuit Local Rule 11(3)

## **II.**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES THE LEGAL VALIDITY OF TWENTY-SIXTH JUDICIAL CIRCUIT LOCAL RULE 11(3), IN THAT THE SOUTHERN DISTRICT OF MISSOURI COURT OF APPEALS HAS DETERMINED THAT JUDGES WITHIN THE TWENTY-SIXTH JUDICIAL CIRCUIT ARE NOT AUTHORIZED TO DENY A DEFENDANT THE RIGHT TO TRANSCRIBE A PRELIMINARY HEARING.**

---

**State of Missouri ex rel. Joy Lynn Hardey v. The Honorable Greg Kays**  
(Mo. App. 1996)

**State of Missouri ex rel. Ralph Swindle v. The Honorable Greg Kays**  
(Mo. App. 1995)

### **III.**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL IS AN ERRONEOUS DECLARATION AND APPLICATION OF THE LAW IN THAT THERE IS NO CONSTITUTIONAL PROVISION, STATE LAW, SUPREME COURT RULE, OR LOCAL RULE THAT AUTHORIZES AN ASSOCIATE CIRCUIT JUDGE TO DENY RELATOR THE RIGHT TO HAVE RELATOR'S OWN CERTIFIED COURT REPORTER TRANSCRIBE RELATOR'S PRELIMINARY HEARING AT HIS OWN EXPENSE, AND TWENTY-SIXTH JUDICIAL CIRCUIT LOCAL RULE 11(3) DOES NOT ALLOW A JUDGE TO DENY TRANSCRIPTION OF A PRELIMINARY HEARING AT RELATOR'S EXPENSE.**

---

Missouri Supreme Court Rule 14

Twenty-Sixth Judicial Circuit Local Rule 11(3)

#### **IV.**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES AND APPLIES THE LAW IN VIOLATION OF SECTION 544.390 RSMO IN THAT SECTION 544.390 RSMO REQUIRES AN ASSOCIATE JUDGE TO CERTIFY ALL EXAMINATIONS CONDUCTED PURSUANT TO ANY OF THE PROVISIONS OF CHAPTER 544 RSMO AND DELIVER A CERTIFIED COPY OF SUCH EXAMINATION TO THE CLERK OF THE COURT.**

---

**State v. Hughey**, 404 S.W.2d 725, 729 (Mo. 1966)

Section 544.370, RSMo 2002

Section 544.390, RSMo 2002

## **STANDARD OF REVIEW**

Prohibition is appropriate where it will prevent abuse of judicial discretion, prevent usurpation of judicial power, or prevent irreparable harm to a party. **State ex rel. Director of Revenue, State of Mo. v. Gaertner**, 32 S.W.3d 564, 566 (Mo. banc 2000); **State ex rel. Linthicum v. Calvin**, 57 S.W.3d 855, 857 (Mo. banc 2001); and **State ex rel. York v. Daugherty**, 969 S.W.2d 223, 224 (Mo. banc 1998). See also **State ex rel. Nixon v. Kinder**, 2003 WL 21788869, 2 (Mo. App. W.D. 2003).

In this case, irreparable harm may result if Relator is not permitted to have a transcript made of his preliminary hearing proceedings. Denial of a transcript violates the Sixth Amendment to the United States Constitution, and Relator's right to effective assistance of counsel. Further, after the preliminary hearing is held, there will be no transcript of the preliminary hearing upon which to base an appeal. It would be impossible to show the appellate court that inconsistencies in testimony or other important information elicited at Relator's preliminary hearing would have had a reversible effect on a later trial. Thus, the harm caused to Relator is irreparable in nature and cannot be cured at a later date through appeal.

While the burden of the Relator in prohibition actions is typically to show that the court exceeded its jurisdiction or abused its discretion, in limited instances, the burden can be a showing that the court erroneously declared the law. **State ex rel. Cohen v. Riley**, 994 S.W.2d 546, 549 (Mo. banc 1999). In **Cohen**, this Court stated:

“[w]hile it is true that prohibition lies where ‘there is an important

question of law decided erroneously,’ a writ is no substitute for appeal, and the error must, therefore, be one ‘that would otherwise escape review by this Court, and [where] the aggrieved party may suffer considerable hardship and expense as a consequence of the erroneous decision.’”

**Id.** quoting **State ex rel. Chassaing v. Mummert**, 887 S.W.2d 573, 577 (Mo. banc 1994). This Court determined that the issue in **Cohen** was an appealable issue, and thus, denied the writ. **Id.**

Clearly, the legal issue of this writ meets this Court’s standard espoused in **Cohen** and **Chassaing**. The issue here is one that would otherwise escape review of this Court; because, if the Honorable Judge Kenneth Oswald’s order stands, there will be no record upon which to appeal, and no manner in which to show that Relator was biased by not having a transcript. Further, Relator faces the possibility of serving most, if not all, of the rest of his life in prison, the societal stigma associated with the crimes, and the lifetime registration requirements of a sexual offender. These are the ultimate potential risks that are associated with Judge Oswald’s decision, and these results would cause considerable hardship and expense on Relator.

As a result, the applicable standard is that Relator must show that the Honorable Judge Kenneth Oswald erroneously declared and/or applied the law.



## **ARGUMENT**

### **I.**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR’S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR’S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES AND APPLIES THE LAW BY VIOLATING THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT A PRELIMINARY HEARING IS A “CRITICAL STAGE” OF CRIMINAL COURT PROCEEDINGS UNDER THE SIXTH AMENDMENT ENTITLING RELATOR TO CERTAIN FUNDAMENTAL RIGHTS INCLUDING THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, THE RIGHT TO EFFECTIVE CONFRONTATION OF WITNESSES, AND THE RIGHT TO A FAIR AND PUBLIC TRIAL, ALL OF WHICH SHOULD PERMIT RELATOR TO RECORD HIS PRELIMINARY HEARING.**

The Sixth Amendment to the United States Constitution requires effective assistance of counsel at a preliminary hearing. Coleman v. Alabama, 399 U.S. 1 (1970). While a preliminary hearing is not a constitutionally required right, the United

States Supreme Court determined in Coleman that if such a process is required through state law, then certain procedural United States Constitutional rights apply. Id. at 9-12. In Coleman, the United States Supreme Court evaluated the Alabama preliminary hearing as a “critical stage” of criminal proceedings entitling a criminal defendant to effective assistance of counsel. The Missouri Supreme Court recognized Coleman and recognized that a preliminary hearing is even more “critical” in the criminal process here than in Alabama. State ex rel. Thomas v. Crouch, 603 S.W.2d 532, 545 (Mo. banc 1980).

A preliminary hearing in Missouri is required by Section 544.250 RSMo in all felony cases unless an indictment is substituted for the information. Missouri Supreme Court Rule 22.09 restates the necessity of a preliminary hearing and dictates that a defendant may cross-examine witnesses and produce evidence at the preliminary hearing. The main purpose of a preliminary hearing is to determine if a felony has been committed and whether probable cause exists to believe that the defendant committed it. J. Wyrsh, S. Hunt, and A. Nugent, Missouri Criminal Trial Practice, at 163 (1994) citing State v. Brinkley, 354 Mo. 337, 189 S.W.2d 314 (1945). Another purpose of the preliminary hearing is to safeguard the defendant from an abuse of power of the prosecutor. State v. McKinley, 341 Mo. 1186, 111 S.W.2d 115, 117 (1937).

Since the Miller County Prosecutor chose to proceed via information and preliminary hearing, the Constitutional rights outlined in Coleman apply. Coleman stated four reasons why a defendant is entitled to an attorney in a preliminary hearing.

A criminal defendant is entitled to effective assistance of counsel at a preliminary hearing for the following reasons:

- 1) First, the cross-examination of the State's witnesses afforded at a preliminary hearing presents an opportunity for counsel to expose weaknesses in the case which could result in dismissal. **Id.**
- 2) Second, cross-examination can, **"...fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused . . ."**.
- 3) Third, counsel can conduct more effective and in depth discovery of the State's case in order to prepare a better defense at trial. **Id.**
- 4) Fourth, the hearing may assist in obtaining bail or psychiatric examination. **Id.**

The message of the United States Supreme Court is clear that a preliminary hearing, if provided through State law, is a "critical stage" where a Defendant is entitled to effective assistance of counsel. The United States Supreme Court's second reason for requiring effective assistance of counsel is key. There, the Court noted that the importance of the preliminary hearing was that counsel was necessary to elicit testimony during the preliminary hearing as a tool for impeachment at a later trial and to preserve the testimony favorable to the accused at a later trial. **Id.** at 10.

By preventing Relator's counsel from taking a transcript of the preliminary hearing, the Honorable Judge Kenneth Oswald is preventing and blocking effective assistance of counsel. He is blocking the use of the testimony elicited at the preliminary hearing as an impeachment tool and is blocking the preservation of favorable testimony if the Relator is ultimately bound over on felony

charges. If such denial is allowed to stand, one of the United States Supreme Court's main purposes in requiring effective assistance of counsel in preliminary hearings is thoroughly and entirely defeated.

Relator recognizes that Section 544.370 RSMo and Missouri Supreme Court Rule 22.10 (formerly Rule 23.12) require the Court to provide the defendant with a transcript of preliminary hearings in homicide cases. Further still, Relator recognizes that one interpretation of Twenty-Sixth Judicial Local Rule 11(3) would seem to allow associate circuit judges discretion as to whether to allow transcription. Further, Relator acknowledges that prior Missouri Supreme Court decisions have indicated that there is no right under the Missouri Statutes or the Missouri Constitution for a defendant to have a transcript of the preliminary hearing prepared and provided to them **at the Court's expense** other than in a homicide case. See **State v. Maxwell**, 400 S.W.2d 156, 159 (Mo. 1966); **State v. Quinn**, 405 S.W.2d 895, 899 (Mo. 1966); **State v. Eaton**, 504 S.W.2d 12 (Mo. 1973) citing **State v. Maxwell**.

However, the cases, the statute, and the rules cited can be distinguished from the Relator's case in two ways. First, **Relator is not requesting that the State or the Court be required to provide the transcript or the court reporter**, as was the request of the defendants in the cases cited above. Relator is only requesting that he be allowed to provide his own reporter, at his own expense, to make a transcript; thereby, allowing him to take advantage of the rights espoused in **Coleman** while not burdening the State or Court with additional costs. Second, Section 544.370 RSMo and Missouri Supreme Court Rule 22.10 (formerly Rule 23.12) were initially adopted **prior to** the decision in **Coleman**. Further, the cases cited above rely on statute and rule

that are antiquated by the implications of Coleman. Given the decision in Coleman, Relator suggests that both the statute and the rules are inconsistent with Coleman and are an unconstitutional violation of Relator's Sixth Amendment right to effective assistance of counsel, effective confrontation of witnesses, and the right to a fair and public trial.

Practically speaking, there is no reason why it would be unfair to require any witnesses who might testify against Relator to tell the truth and testify consistently. The one accomplishment of forbidding a record of preliminary hearing proceedings is to limit the defendant's ability to defend himself. In doing so, the Sixth Amendment to the United States Constitution is not only violated, but the record of the proceeding is effectively closed to public scrutiny. In this case, the alleged victim is 14 years old, and the judge is unlikely to allow the public to observe her testimony. It is widely accepted that witnesses are less likely to commit perjury when they know that the testimony can be reviewed by the public. U.S. ex rel. Bennett v. Rundle, 419 F.2d 599, 606 (3d Cir. 1969).

Not only do open proceedings, or in this case, a transcript, prevent perjury, but they preserve the appearance of justice and check judicial abuses. U.S. v. Cianfrani, 573 F.2d 835, 852-853 (3d Cir. 1978). In fact, according to the United States Supreme Court, the primary purpose of the Sixth Amendment as a whole is to protect a defendant from official misconduct. Gannett v. DePasquale, 443 U.S. 368, 380 (1979). A record of the preliminary hearing only furthers the overarching purpose of the Sixth Amendment.

By blocking transcription of the preliminary hearing, the Associate Circuit Court is defeating one of the main reasons that counsel is required at a preliminary hearing. In doing so, effective

assistance of counsel is prevented, in direct violation of Coleman. Further, blocking transcription serves no legitimate interest, but causes harm to the Relator and the system.

In order to ensure that the Sixth Amendment rights to effective assistance of counsel, effective cross-examination of witnesses, and fair, public trial are protected, and in order to ensure that the United States Supreme Court's justification of requiring counsel at a preliminary hearing is not thwarted and rendered meaningless, Relator should be allowed to have a certified court reporter transcribe his preliminary hearing at his own expense. To deny such request is an erroneous declaration and application of the Sixth Amendment to the United States Constitution.

## II.

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES THE LEGAL VALIDITY OF TWENTY-SIXTH JUDICIAL CIRCUIT LOCAL RULE 11(3), IN THAT THE SOUTHERN DISTRICT OF MISSOURI COURT OF APPEALS HAS DETERMINED THAT JUDGES WITHIN THE TWENTY-SIXTH JUDICIAL CIRCUIT ARE NOT AUTHORIZED TO DENY A DEFENDANT THE RIGHT TO TRANSCRIBE A PRELIMINARY HEARING.**

The Honorable Judge Kenneth Oswald's ruling denying Relator's request to retain a certified court reporter, certified pursuant to Missouri Supreme Court Rule 14, to record his Preliminary Hearing by stenographic reporting at his own expense was made in the Twenty-Sixth Judicial Circuit of Missouri in Miller County. The Missouri Court of Appeals for the Southern District addressed the same issue in two other Twenty-Sixth Judicial Circuit writ applications. The first action, State of Missouri ex rel. Ralph Swindle v. The Honorable Greg Kays (Mo. App. 1995), arose out of an action in Camden County, Missouri. The second action, State of Missouri ex rel. Joy Lynn Hardey v. The Honorable Greg Kays (Mo. App. 1996) arose out of an action in Laclede County, Missouri. In each of those non-homicide cases, the Southern District

granted a writ of prohibition, and ordered the judge to allow recording of the preliminary hearing by a certified court reporter (said orders are attached hereto).

One of the writs was issued by the Southern District prior to the implementation of Local Rule 11(3), which was placed into effect January 1, 1996. The writ in **State of Missouri ex rel. Joy Lynn Hardey v. The Honorable Greg Kays** (Mo. App. 1996) is unclear as to the date it was issued. The Final Order states that the Petition in Prohibition was filed on November 14, 1996; however, the Final Order later states that the Preliminary Order was issued November 14, 1995. Regardless of the exact date the writ was issued, the Southern District sent a clear message that a defendant cannot be denied the right to have his own preliminary hearing transcribed at his own expense by judges of the Twenty-Sixth Judicial Circuit. This is regardless of whether those judges make a local rule contrary. In fact, the Final Order issued in **State of Missouri ex rel. Joy Lynn Hardey v. The Honorable Greg Kays** (Mo. App. 1996), after ordering the Honorable Judge Greg Kays to allow transcription, stated, “[y]ou are further advised to consider the consequences of further enforcement of the alleged policy of not permitting the use of a court reporter in a preliminary hearing under the circumstances such as exist in this case.”

Since the time of these Southern District decisions, Relator and Relator’s counsel know of no other denial of the right to have a preliminary hearing transcribed at the Defendant’s own expense within the Twenty-Sixth Judicial Circuit.<sup>1</sup>

---

<sup>1</sup> It should be noted that although Miller County is in the Twenty-Sixth Judicial Circuit, it is in the Western District of Missouri, while Camden and Laclede Counties



These two writs, including the written orders, were brought to the attention of the Honorable Judge Kenneth Oswald when Relator requested the opportunity to have a certified court reporter transcribe his preliminary hearing. Despite the knowledge that the Missouri Southern District Court of Appeals had already prohibited this action multiple times and issued an ultimatum, the Honorable Judge Kenneth Oswald denied Relator's request. To deny such request is an erroneous declaration and application of the applicable law as interpreted by the Missouri Southern District Court of Appeals.

---

are in the Southern District of Missouri.

### **III.**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL IS AN ERRONEOUS DECLARATION AND APPLICATION OF THE LAW IN THAT THERE IS NO CONSTITUTIONAL PROVISION, STATE LAW, SUPREME COURT RULE, OR LOCAL RULE THAT AUTHORIZES AN ASSOCIATE CIRCUIT JUDGE TO DENY RELATOR THE RIGHT TO HAVE RELATOR'S OWN CERTIFIED COURT REPORTER TRANSCRIBE RELATOR'S PRELIMINARY HEARING AT HIS OWN EXPENSE, AND TWENTY-SIXTH JUDICIAL CIRCUIT LOCAL RULE 11(3) DOES NOT ALLOW A JUDGE TO DENY TRANSCRIPTION OF A PRELIMINARY HEARING AT RELATOR'S EXPENSE.**

The Honorable Judge Kenneth Oswald, in his order, relies on Twenty-Sixth Judicial Circuit

Local Rule 11(3) which states:

“[a]ll persons except those authorized by the court to preserve the record shall refrain from using recording devices including stenographic reporting in the courtrooms while court is in session. Provided however, any judge presiding in an associate circuit judge division may, in his/her discretion, on a case by case basis

and for good cause shown, permit counsel of record to use a recording device or stenographic equipment during court proceedings.” (See attached copy of Twenty-Sixth Judicial Circuit Local Rule 11(3)).

This Rule is not applicable here and it has been only been construed to be applicable through an erroneous interpretation of the Rule. The Rule addresses counsel’s own use of recording and stenographic equipment. It does not address use of stenographic equipment by a certified court reporter, authorized to preserve the record under Missouri Supreme Court Rule 14.

Relator’s counsel did not request that he, or any of his staff, be allowed to use a recording device or stenographic equipment as contemplated by the Local Rule. Rather, Relator provided, at his own expense, a certified court reporter who was authorized to preserve the record pursuant to Missouri Supreme Court Rule 14. The first portion of Local Rule 11(3) states that reporters authorized to preserve the record are exempt from the Rule.

A careful reading of the Rule indicates that if a court reporter, authorized to preserve the record under Missouri Supreme Court Rule 14, is present, the Court has no authority with which to deny a recording of the court proceeding. Further, it is doubtful that the judges of the Twenty-Sixth Judicial Circuit would create a local rule in direct conflict with the edict of the Southern District.

To the extent that Respondent may attempt to construe and argue that Twenty-Sixth Judicial Circuit Local Rule 11(3) affords Respondent discretion to deny the recording of a preliminary hearing, the Southern District Court of Appeals has clearly declared that judges of the Twenty-Sixth Judicial Circuit do not have discretion to deny transcription. Further, Relator can

imagine no legitimate reason why the recording of a preliminary hearing, at the defendant's expense, should be prevented.

The failure to allow the recording of a preliminary hearing only undermines the requirement of truthful testimony and allows for the potential for witnesses to change their testimony later at trial.

A defendant in a criminal case is not fully able to rely on testimony either favorable or unfavorable given at a preliminary hearing in preparing for trial without the ability to effectively impeach a witness who might change his or her testimony. Further, important trial strategy defenses and decisions in plea bargaining negotiations and agreements are based upon testimony given at a preliminary hearing.

Testimony that is recorded is more likely to be given accurately, carefully, and truthfully when all parties to the process understand that it is being recorded. Recorded testimony is less likely to change over time and ensures that anyone, including the public or press, can review the record for possible abuse.

Local Rule 11(3) is not designed to prevent certified court reporters from taking records of court proceedings. Instead, it is designed to ensure that judges in the Twenty-Sixth Judicial Circuit have the right to limit a non-qualified or non-certified party from attempting to take a record.

Even if it is argued that the intention of the Rule is to give the judge unfettered discretion, even when a certified court reporter is retained, the Southern District Court of Appeals has already stated that this is not permissible and has ordered a judge within the Twenty-Sixth Judicial Circuit to allow such a record to be made on two separate occasions. Further, it makes no sense to limit a defendant and his or her right to a defense when it costs the State nothing and serves the purpose

of truth in the Missouri Court system. To deny such request is an erroneous declaration and application of the Local Rule 11(3) and the Missouri Southern District Court of Appeals interpretation of the law.

#### **IV.**

**RELATOR IS ENTITLED TO AN ORDER PROHIBITING RESPONDENT FROM DENYING RELATOR'S REQUEST TO ALLOW A CERTIFIED COURT REPORTER, AT HIS OWN EXPENSE, TO RECORD RELATOR'S PRELIMINARY HEARING PROCEEDINGS BECAUSE SUCH DENIAL ERRONEOUSLY DECLARES AND APPLIES THE LAW IN VIOLATION OF SECTION 544.390 RSMO IN THAT SECTION 544.390 RSMO REQUIRES AN ASSOCIATE JUDGE TO CERTIFY ALL EXAMINATIONS CONDUCTED PURSUANT TO ANY OF THE PROVISIONS OF CHAPTER 544 RSMO AND DELIVER A CERTIFIED COPY OF SUCH EXAMINATION TO THE CLERK OF THE COURT.**

Section 544.390 RSMo requires that all examinations in proceedings, held pursuant to Chapter 544 RSMo, be transcribed and certified by the Associate Court Judge and then delivered to the Clerk of the Court. There is no language within this Section that limits the applicability of this Statute to homicide cases only. By contrast, Section 544.370 RSMo requires that only evidence given in cases of homicide shall be required to be reduced to writing and signed by the witnesses. Neither statute refers specifically to preliminary hearings, but the statutes are in conflict with each other.

When two statutes directly contradict one another, this Court often looks to resolve the ambiguity within the statutes themselves. The essential difference in the two statutes is that Section

544.370 RSMo requires the Associate Circuit Judge to take the record in homicide cases. Section 544.390 RSMo only requires the judge to certify the examination after it is taken. Therefore, both Sections 544.370 and 544.390 RSMo show an intent by the Missouri General Assembly to ensure all preliminary hearings are recorded; however, the General Assembly has assigned a special significance to homicide cases in ensuring that the court is responsible for transcripts being made of those proceedings. In all other felony cases, it is the responsibility of the State or the defendant to provide the written record to be certified by the court.

In sum, the correct interpretation of these statutes is that Section 544.370 RSMo requires the court to provide a transcript in all homicide proceedings, but in other proceedings, Section 544.390 RSMo requires that a transcript of all examinations be taken by the defendant or the state and then certified by the judge.

According to **State v. Hughey**, 404 S.W.2d 725,729 (Mo. 1966) the purpose of Section 544.390 RSMo is to assure a fair preliminary examination and to preserve the evidences taken. Certainly, this purpose is ideal in all felony cases.

However, it appears that over the course of the last sixty years, several cases have lumped Section 544.390 RSMo together with Section 544.370 RSMo including the **Hughey** case. **Id.** See also **State v. Ferguson**, 212 S.W. 339, 278 Mo. 119 (Mo. banc 1919); **State v. Maxwell**, 400 S.W.2d 156, 159 (Mo. 1966); **State v. Quinn**, 405 S.W.2d 895, 899 (Mo. 1966); **State v. Eaton**, 504 S.W.2d 12 (Mo. 1973) citing **State v. Maxwell**.

Section 544.390 RSMo has been improperly interpreted as working in conjunction with Section 544.370 RSMo. Upon inspection of the text, Section 544.390 RSMo does not in any way

refer back to Section 544.370 RSMo. Instead Section 544.390 refers back to the entire 544 Chapter which governs all preliminary hearings, not just homicide cases. Section 544.390 requires that all examinations taken pursuant Chapter 544 RSMo be certified by the associate judge and delivered to the clerk of the court . If no transcript is made by the State or the defendant, then the examination cannot be certified, and the statute has been violated. At Relator's eventual preliminary hearing, examination of witnesses will take place pursuant to the provisions of Chapter 544 RSMo, and Relator is entitled to take a transcript of the those proceedings and have them certified by the court in accordance with Section 544.390 RSMo. To deny such request is an erroneous declaration and application of Section 544.390 RSMo.



## **CONCLUSION**

A Constitutionally recognized reason for a preliminary hearing is the right to use a transcript of a preliminary hearing as a later tool for impeachment of the State's witnesses at trial and to preserve favorable testimony. See **Coleman v. Alabama**, 399 U.S. 1, 10 (1970). The United States Supreme Court believed this right and others to be so important that in **Coleman**, the Court stated that each Defendant is entitled to a lawyer at a preliminary hearing to protect these rights, including the right of impeachment and the right to preserve favorable testimony. It is difficult, if not impossible, to use the preliminary hearing as an impeachment tool if no record is allowed to be made of such hearing. If such denial is allowed to stand, one of the United States Supreme Court's main purposes in directing the appointment of counsel in preliminary hearings is thoroughly and entirely defeated. Defeating the purpose of having counsel present equates to a denial of counsel.

Setting aside the fact that the United States Supreme Court has recognized the importance of transcripts in a preliminary hearing, the ultimate goal of any criminal court process is truth. Transparency of the system is paramount to truth in the United States Court system. This is true in all stages of a proceeding, not just a trial. *Note*, **The Right to Attend Criminal Hearings**, 78 Colum. L. Rev. 1308 (1978).

The main function of a preliminary hearing is to prevent governmental abuse. In order to most effectively prevent governmental abuse, all actions taken in a preliminary hearing should be transcribed. It is not surprising that the State has attempted to block

Relator's efforts in obtaining a transcript of his preliminary hearing, in that the Prosecutor's actions and those of his or her witnesses are the same actions that come under scrutiny when such a hearing is transcribed.

The Prosecuting Attorney for Miller County wrote in his Answer to Petition for Writ of Prohibition that, "[i]t stretches the boundaries of logic and common sense to conclude that this strategy, which relator seeks to employ in this case, constitutes a quest for truth." Id. at 9. Relator states that the Prosecuting Attorney for Miller County is absolutely and completely incorrect. **Logic and common sense dictate that recorded testimony seeks, ensures, and preserves truth more effectively than non-recorded testimony and provides a transparency which allows a defendant, the public, and the press to safeguard against official abuses.**

The Honorable Judge Kenneth Oswald has erroneously declared and applied the law and the issuance of a writ of prohibition is appropriate to prevent such erroneous declaration to continue in Relator's case and any future felony criminal cases in the Twenty-Sixth Judicial Circuit. Further, such writ is necessary to prevent irreparable harm to Relator.

BERGMANIS & McDUFFEY, L.L.C.

BY:

\_\_\_\_\_  
Erik A. Bergmanis, Mo. Bar #33151

BY: \_\_\_\_\_

—  
Matthew C. Price, Mo. Bar #51520  
Attorneys at Law  
237 W. Hwy. 54, Ste. 201  
P.O. Box 229  
Camdenton, MO 65020  
Phone: (573) 346-2111  
Fax: (573) 346-5885

ATTORNEYS FOR RELATOR  
SAMUEL STEELEY

**CERTIFICATE OF SERVICE AND OF COMPLIANCE**

I hereby certify:

1. That the attached brief complies with the limitations contained in Missouri Supreme Court Rule 84.06(b) and contains 5,877 words, excluding the cover, this certification and the appendix, as determined by Word Perfect 8 software;
2. That the floppy disk filed with this brief, containing a copy of this brief, has been scanned for viruses and is virus-free; and
3. That two true and correct copies of the attached brief, and a floppy disk containing a copy of this brief, were mailed, postage prepaid, this 19<sup>th</sup> day of March, 2004, to Robert J. Seek, Prosecuting Attorney of Miller County, P.O. Box 12, Tuscumbia, MO 65082.

\_\_\_\_\_  
ERIK A. BERGMANIS

## **RELATOR'S APPENDIX**

## **RELATOR’S APPENDIX INDEX**

Order denying transcription .....	A-1
Final Order in Prohibition re: <b><u>State of Missouri ex rel. Ralph Swindle</u></b>	
<b><u>v. The Honorable Greg Kays</u></b> .....	A-3
Final Order in Prohibition re: <b><u>State of Missouri ex rel. Joy Lynn Hardey</u></b>	
<b><u>v. The Honorable Greg Kays</u></b> (Mo. App. 1996).....	A-5
Twenty-Sixth Judicial Circuit Local Rule 11(3) .....	A-7
U.S. Const. Amend. VI .....	A-8
Article V, Section 4, Missouri Const. 1945 .....	A-9
Section 544.250, RSMo 2002 .....	A-10
Section 544.370, RSMo 2002 .....	A-12
Section 544.390, RSMo 2002 .....	A-13
Section 566.034, RSMo 1999 .....	A-14
Section 566.064, RSMo 1999 .....	A-15
Section 568.020, RSMo 1999 .....	A-17
Missouri Supreme Court Rule 22.10 .....	A-19
Missouri Supreme Court Rule 22.09 .....	A-21
Missouri Supreme Court Rule 14.....	A-22